

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DUANE BERRYHILL,

No. 2:23-cv-00315 WBS AC

Plaintiff,

v.

ORDER RE: PLAINTIFF'S MOTION
TO REMAND

COSTCO WHOLESALE CORPORATION,
ALEXIS FONG, and DOES 1 to 20,
inclusive,

Defendants.

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Plaintiff Duane Berryhill initiated this premises liability action against defendants Costco Wholesale Corporation and Alexis Fong (a Costco store manager) for injuries resulting from a slip-and-fall incident at a Costco store. (See Compl. (Docket No. 1-1).) Defendants removed the action to this court from the San Joaquin County Superior Court based on diversity. (Docket No. 1.)

Plaintiff now moves to remand, arguing that removal is improper because complete diversity does not exist. (Mot.

1 (Docket No. 5).) Defendant contends that defendant Fong was
2 fraudulently joined to defeat diversity. (Opp'n (Docket No. 6).)

3 I. Fraudulent Joinder

4 "Under 28 U.S.C. § 1441, a defendant may remove an
5 action filed in state court to federal court if the federal court
6 would have original subject matter jurisdiction over the action."
7 Moore-Thomas v. Ala. Airlines, Inc., 553 F.3d 1241, 1243 (9th
8 Cir. 2009). There is a "strong presumption" against exercising
9 removal jurisdiction, and "[f]ederal jurisdiction must be
10 rejected if there is any doubt as to the right of removal in the
11 first instance." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th
12 Cir. 1992) (internal citations omitted).

13 Federal courts have original jurisdiction over cases
14 where complete diversity exists between the parties and the
15 amount in controversy exceeds \$75,000, exclusive of interest and
16 costs. 28 U.S.C. § 1332(a). Complete diversity exists where
17 each plaintiff is a citizen of a different state than each
18 defendant. Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067
19 (9th Cir. 2001).

20 "In determining whether there is complete diversity,
21 district courts may disregard the citizenship of a non-diverse
22 defendant who has been fraudulently joined." Grancare, LLC v.
23 Thrower, 889 F.3d 543, 548 (9th Cir. 2018) (citing Chesapeake &
24 Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 152 (1914)). "A
25 defendant invoking federal court diversity jurisdiction on the
26 basis of fraudulent joinder bears a 'heavy burden' since there is
27 a 'general presumption against finding fraudulent joinder.'"
28 Grancare, 889 F.3d at 548 (quoting Hunter v. Philip Morris USA,

1 582 F.3d 1039, 1046 (9th Cir. 2009)).

2 "There are two ways to establish fraudulent joinder:
3 (1) actual fraud in the pleading of jurisdictional facts, or (2)
4 inability of the plaintiff to establish a cause of action against
5 the non-diverse party in state court." Id. (internal quotation
6 marks omitted). "Fraudulent joinder is established the second
7 way if a defendant shows that an 'individual joined in the action
8 cannot be liable on any theory.'" Id. (quoting Ritchey v. Upjohn
9 Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998)) (alteration
10 adopted). This requires "extraordinarily strong evidence or
11 arguments that a plaintiff could not possibly prevail on her
12 claims against the allegedly fraudulently joined defendant." Id.

13 "[T]he test for fraudulent joinder and for failure to
14 state a claim under Rule 12(b) (6) are not equivalent. A claim
15 against a defendant may fail under Rule 12(b) (6), but that
16 defendant has not necessarily been fraudulently joined." Id. at
17 549. Rather, the standard for fraudulent joinder is akin to the
18 "wholly insubstantial and frivolous" standard for dismissing
19 claims under Rule 12(b) (1) for lack of federal question
20 jurisdiction. Id. "[I]f there is a possibility that a state
21 court would find that the complaint states a cause of action
22 against any of the resident defendants, the federal court must
23 find that the joinder was proper and remand the case to the state
24 court." Id. (citing Hunter, 582 F.3d at 1046) (emphasis in
25 original). Put another way, "[r]emand must be granted unless the
26 defendant shows that the plaintiff 'would not be afforded leave
27 to amend his complaint to cure the purported deficiency.'" Nasrawi v. Buck Consultants, LLC, 776 F. Supp. 2d 1166, 1170

1 (E.D. Cal. 2011) (Wanger, J.) (quoting Burris v. AT & T Wireless, Inc., No. 06-02904 JSW, 2006 WL 2038040, at *2 (N.D. Cal. 2006)).

3 In analyzing fraudulent joinder, a court may look
4 beyond the pleadings and conduct a “summary inquiry . . . to
5 identify the presence of discrete and undisputed facts that would
6 preclude plaintiff’s recovery against the in-state defendant.”
7 Allen v. Boeing Co., 784 F.3d 625, 634 (9th Cir. 2015) (citing
8 Hunter, 582 F.3d at 1044) (internal quotation marks omitted).

9 There is no dispute that plaintiff and defendant Fong
10 are both citizens of California and thus lack diversity.
11 Defendant Costco is a citizen of Washington. (See Decl. of
12 Nathaniel L. Dunn (Docket No. 2) ¶ 8.) Accordingly, removal is
13 appropriate only if defendant Fong was fraudulently joined.

14 Plaintiff alleges that defendant Fong is responsible
15 for his injuries under a theory of premises liability. The
16 elements of a premises liability claim are “a legal duty of care,
17 breach of that duty, and proximate cause resulting in injury.”
18 Kesner v. Super. Ct., 1 Cal. 5th 1132, 1158 (Cal. 2016).
19 “Premises liability is grounded in the possession of the premises
20 and the attendant right to control and manage the premises;
21 accordingly, mere possession with its attendant right to control
22 conditions on the premises is a sufficient basis for the
23 imposition of an affirmative duty to act.” Id. (internal
24 quotation marks omitted). “[C]ontrol is defined as the power to
25 prevent, remedy or guard against the dangerous condition.”
26 Colonial Van & Storage, Inc. v. Super. Ct., 76 Cal. App. 5th 487,
27 497 (2d Dist. 2022) (internal quotations and citations omitted).
28 The defendant must also have actual or constructive knowledge of

1 the dangerous condition. Ortega v. Kmart Corp., 26 Cal. 4th
2 1200, 1206 (Cal. 2001).

3 In arguing that defendant Fong was fraudulently joined,
4 defendant makes various factual allegations pertaining to the
5 slip-and-fall incident, including (1) “[t]here was no failure to
6 develop appropriate safety procedures” at that Costco location;
7 (2) defendant Fong’s “job responsibilities do not include picking
8 up empty pallets [like the one plaintiff allegedly tripped on] or
9 overseeing the employees who do”; (3) defendant Fong lacked
10 actual notice of the allegedly dangerous condition and was not
11 present on the premises at the time of plaintiff’s injury; and
12 (4) plaintiff’s actions contributed to his injury. (See Opp’n at
13 6-8.) Defendant Fong provides a declaration in support of these
14 allegations. (See Docket No. 6-5.)

15 These arguments fail for multiple reasons. First, a
16 self-serving declaration written by the defendant in question
17 hardly qualifies as the “extraordinarily strong evidence”
18 required to prove fraudulent joinder. See Grancare, 889 F.3d at
19 548. This declaration does not provide sufficient evidence to
20 conduct a “summary inquiry” that resolves in defendant’s favor,
21 which “itself points to an inability of the removing party to
22 carry its burden.” See Allen, 784 F.3d at 634 (citing Hunter,
23 582 F.3d at 1044). Second, defendants’ arguments would require
24 the court to engage in a “searching inquiry into the merits of
25 the plaintiff’s case,” which is inappropriate when considering
26 fraudulent joinder. See Grancare, 889 F.3d at 548-49.

27 Defendant has not provided strong evidence or cited any
28 authority suggesting that plaintiff could not possibly prevail

1 against defendant Fong on a premises liability claim. To the
2 contrary, “[c]ourts have specifically allowed a plaintiff to
3 bring . . . premises liability claims against store managers in
4 situations similar to the instant [a]ction.” See, e.g., Thomas
5 v. WalMart Stores, Inc., No. 18-cv-03422 RSWL SK, 2018 WL
6 3046967, at *4 (C.D. Cal. June 19, 2018) (citing Trujillo v.
7 Target Corp., No. 17-cv-06429 VAP GJS, 2017 WL 4864490, at *5
8 (C.D. Cal. Oct. 26, 2017); Revay v. Home Depot U.S.A., Inc., No.
9 2:14-cv-03391 RSWL AS, 2015 WL 1285287, at *3 (C.D. Cal. Mar. 19,
10 2015)) (rejecting fraudulent joinder argument and remanding slip-
11 and-fall premises liability case brought against WalMart store
12 manager). See also, e.g., Nieves v. Costco Wholesale Corp., No.
13 3:22-cv-00977 JD, 2022 WL 5199904, at *2 (N.D. Cal. Oct. 5, 2022)
14 (rejecting fraudulent joinder argument and remanding slip-and-
15 fall premises liability case brought against Costco store manager
16 who was not present in the store on the day of the alleged
17 injury); Dirkes v. Sam's W., Inc., No. 2:22-cv-03466 JLS MAR,
18 2022 WL 17098672, at *5 (C.D. Cal. Sept. 7, 2022) (“As the
19 analyses in similar cases recognize, it is plausible that [the
20 defendant] may be liable for . . . premises liability as a store
21 manager.”).

22 Based on the argument and evidence presented by
23 defendant, the court cannot conclude that there is no possibility
24 that defendant Fong may be liable on a theory of premises
25 liability. Accordingly, the court concludes that defendant Fong
26 was not fraudulently joined, and therefore complete diversity is
27 lacking. Defendant has thus failed to overcome “both the strong
28 presumption against removal jurisdiction and the general

1 presumption against fraudulent joinder." See Hunter, 582 F.3d at
2 1046 (internal quotation marks omitted).

3 II. Attorneys' Fees

4 Plaintiff requests that the court award him attorneys'
5 fees and costs incurred in filing this motion pursuant to 28
6 U.S.C. § 1447(c). "Absent unusual circumstances, courts may
7 award attorney's fees under § 1447(c) only where the removing
8 party lacked an objectively reasonable basis for seeking
9 removal." Martin v. Franklin Capital Corp., 546 U.S. 132, 141
10 (2005).

11 Here, defendants failed to cite any relevant evidence
12 or legal authority that supported removal. Further, there are
13 numerous cases that have rejected nearly identical fraudulent
14 joinder arguments involving store managers in slip-and-fall
15 premises liability cases; at least one of those cases involved
16 defendant Costco. See Nieves, 2022 WL 5199904, at *2.
17 Accordingly, the court concludes that defendants lacked an
18 objectively reasonable basis for seeking removal and will grant
19 plaintiff's request for attorneys' fees. See Grancare, 889 F.3d
20 at 552 (affirming district court's grant of attorneys' fees
21 following remand where defendant's fraudulent joinder argument
22 lacked reasonable support in district court case law); Hung Duong
23 v. ITT Educ. Servs., Inc., No. 1:14-cv-01257 AWI SA, 2014 WL
24 4634998, at *7 (E.D. Cal. Sept. 10, 2014) (awarding attorneys'
25 fees where Defendant argued fraudulent joinder but "identified no
26 cases which counter Plaintiff's cases, meaning the weight of
27 authority was firmly against Defendants' position").

28 Plaintiff requests \$2,563 in attorneys' fees and costs.

1 This figure results from 9 attorney hours billed at a rate of
2 \$275, plus \$88 in travel costs. Defendants do not dispute that
3 the number of hours or rate requested are reasonable.

4 Based on the court's experience, the amount requested
5 appears reasonable. See Oth Ingram v. Oroudjian, 647 F.3d 925,
6 928 (9th Cir. 2011) (in determining what constitutes a reasonable
7 attorneys' fee, district courts may rely on "their own knowledge
8 of customary rates and their experience concerning reasonable and
9 proper fees"). See also, e.g., Siafarikas v. Mercedes-Benz USA,
10 LLC, No. 2:20-cv-01784 JAM AC, 2022 WL 16926265, at *3 (E.D. Cal.
11 Nov. 14, 2022) (approving hourly rates ranging from \$250 to
12 \$500); Hung Duong, 2014 WL 4634998, at *8 (granting \$2,605 in
13 attorneys' fees and costs associated with motion to remand
14 following defendant's removal based on fraudulent joinder, based
15 on 8.4 hours of attorney work and \$85 in costs).

16 IT IS THEREFORE ORDERED that plaintiff's motion to
17 remand and for attorneys' fees (Docket No. 5) be, and the same
18 hereby is, GRANTED. This case is hereby REMANDED to the Superior
19 Court of the State of California, in and for the County of San
20 Joaquin. Plaintiff is awarded \$2,563 in attorneys' fees and
21 costs.

22 Dated: May 7, 2023


WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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